Supreme Court, U.S.
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No. -

In The

Supreme Court Of The United States

CHARLES KLISSER

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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29pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a wire fraud conviction may be predicated upon the bare terms of a proposed transaction without extrinsic proof of falsity or necessary injury to another.

2. Whether Sentence Guideline 2F1.1 properly permits enhancement of sentence for "intended loss" where the fraud conviction derives from a government-instigated "sting operation."

PARTIES TO THE PROCEEDINGS

The Petitioner is Charles Klisser. Petitioner is a defendant in this case and an appellant in the court below. Petitioner is an individual and thus there are no disclosures to be made pursuant to Supreme Court Rule 29.6.

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In The

Supreme Court Of The United States

CHARLES KLISSER

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court of Appeals
For the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Charles Klisser respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals and the order denying rehearing thereon are included herein at the Appendix, pages A-1 to A-15.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment below on August 24, 1999 (Appendix, page A-1), and further entered its order denying rehearing in the matter on October 15, 1999 (Appendix, page A-14, 15). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner herein was convicted, after jury trial, of the offense of wire fraud per 18 U.S.C. Section 1343. On October 30, 1998, Petitioner was sentenced to a term of 24 months on said conviction. Petitioner duly appealed to the United States Court of Appeals for the Second Circuit, raising the contentions that he was convicted upon wholly insufficient evidence, and that the trial Court erroneously applied Sentencing Guideline 2F1.1, applicable to the calculation of "loss" in the context of a wire fraud offense.

The conviction itself arose out of a "sting" operation in which a government agent posed as an accountant for a labor union, who would temporarily divert or embezzle funds to be placed in an investment opportunity offered by Petitioner. The wire fraud charge was based upon the theory that the investment opportunity offered by Petitioner was itself fraudulent in nature. Specifically, the prosecution stated that its theory was that the investment was "too good to be true." At trial the government offered no evidence that the investment proposed by Petitioner was fraudulent, other than Petitioner's own descriptions of the transaction. No monies were ever invested by the government agent.

At sentencing upon conviction, the trial Court, utilizing Sentence Guideline 2F1.1, enhanced Petitioner's base offense level by 12 levels, based upon an intended loss figure of 1.5 million dollars.

On Appeal, Petitioner argued that the complete absence of evidence of fraud in the proposed transaction, other than Petitioner's own description of the transaction proposed, rendered the evidence insufficient to convict, as a matter of law, and further contended that the sentence enhancement was improper in the context of a sting operation involving a mythical, government-created "victim.." The Court of Appeals rejected both of these contentions, and summarily denied Petitioner's request for rehearing on October 15, 1999.

———— ♦ ————

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals Was Erroneous:

Petitioner's claim of evidentiary insufficiency at trial was based upon the recognized proposition that

> Where the necessary result of the actor's scheme is to injure others, fraudulent intent may be inferred from the scheme itself...where the scheme does not cause injury to the alleged victim as its necessary result, the government must produce evidence independent of the alleged scheme so show the defendant's fraudulent intent.

United States v. D'Amato, 39 F.3d 1249, 1257 (2nd Cir. 1994).

In the instant case, the Court of Appeals expressly relied upon the terms of the proposal itself in deciding that Petitioner harbored a fraudulent intent (Appendix A, page 12). That is, the Appeals Court accepted the government's proposition that an investment may be deemed "fraudulent" on the theory that it is "too good to be true." This Honorable Court has never endorsed such a proposition, which runs counter to the equally settle rule that the "scheme" referenced in the mail fraud statute must

be coupled with a contemplated harm to the victim. See Regent Office Supply Co., 421 F.2d 1174, 1180 (2nd Cir. 1970); D'Amato, supra, at 1257.

With respect to the sentencing issue, the per curiam opinion of the Second Circuit herein adds to a split of circuit authority on the question of proper application of Sentence Guideline 2F1.1 in the context of a government initiated sting operation. The Sixth and Tenth Circuits hold that a defendant may not be sentenced on the basis of harm which he is incapable of inflicting, which would clearly be the case in a sting operation instigated by the government in which no "victim" ever existed. See United States v. Galbraith, 20 F.3d 1054 (10th Cir. 1994); United States v. Watkins, 994 F.2d 1192, 1196 (6th Cir. 1993); United States v. Sneed, 34 F.3d 1570, 1584 (6th Cir. 1994).

The Appellate Court herein explicitly rejected the Galbraith analysis and opted to join those Circuits which follow United States v. Studevent, 116 F.3d 1559, 1561-64 (D.C. Cir. 1997) in holding that a sentence may be enhanced to the degree that it is possible to ascertain the amount of loss which the actor was attempting to inflict. See, e.g., United States v. Schlei, 122 F.3d 944, 996 (11th Cir. 1997); United States v. Robinson, 94 F.3d 1325, 1329 (9th Cir. 1996).

Petitioner has consistently urged that the Galbraith ruling and rationale is the appropriate approach to take in a "sting" setting, in that any other approach introduces elements of uncertainty in the sentencing process in terms of identifying a defendant's subjective intent, and fostering

heightened sentences based upon the power of government agents to control or inject a monetary loss figure into the case arbitrarily. On these grounds, Petitioner respectfully submits that the Appellate Court analysis of the sentencing issue was erroneous.

II. The Questions Presented Are Important:

The question of evidentiary sufficiency herein disclose contrary rulings within the Second Circuit on the appropriate test of "fraudulent intent," with respect to use of the terms of a proposed transaction alone as the basis of concluding that the defendant intended to harm another. The requirement that the proposed transaction be fraudulent on its face, or shown to be fraudulent by extrinsic evidence, arises from the truism that fraudulent intent is ordinarily derivable from false representations upon which the victim is made to bargain without essential facts, or a discrepancy between benefits reasonably anticipated due to the defendant's representations and the actual benefits delivered. See Regents, supra, at 1182. Where the "fraud" is premised upon the wholly subjective conclusion that the bargain is "too good to be true," a defendant can suffer conviction for fraud on the basis of proposals which have not been demonstrated to be false at all. Such a theory of culpability is nowhere justified in authority known to Petitioner's counsel.

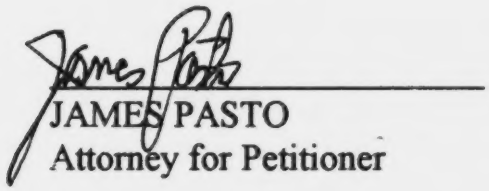
With respect to the sentencing question raised herein, a clear split in Circuit treatment of Sentencing Guideline 2F1.1 has arisen, within the meaning of Supreme Court Rule 10.1(a). See, e.g., McElroy v. United

States., 455 U.S. 642, 643 (1982). Moreover, counsel respectfully submits that the issue is of substantial importance, as it pertains to the appropriate method of sentencing in cases in which the government itself is the active initiator of the offense itself. Many circuits have held that "economic reality" is the benchmark of assessing appropriate punishment in fraud cases. United States v. Khan, 969 F.2d 218, 220-21 (6th Cir. 1992); United States v. Santiago, 977 F.2d 517, 520 (10th Cir. 1992); United States v. Schneider, 930 F.2d 555, 559 (7th Cir. 1991). Where, as in the instant case, the government agent initiates the negotiation with the defendant, and arbitrarily interjects a figure (here, $10 million) as the amount to possibly be invested, the concept of "economic reality" is wholly extinguished, and merely affords the government an opportunity to escalate sentences at the whim of its agents. The problem is simply underscored in the instant case, where the trial Court chose a loss figure of 1.5 million dollars upon no other stated basis than to be "fair" to the Petitioner. There is nothing "fair" about a sentencing theory which is not only arbitrary, but divorced from economic reality in terms of the slightest possibility that any harm could result from the transaction initiated by the government. Accordingly, counsel submits that the sentencing issues raised herein clearly impacts upon a number of fraud cases nationwide, in which government agents are the initiators and the controllers of the proposed transaction to be punished.

CONCLUSION

The Petitioner for a Writ of Certiorari should be granted.

Date: 3/17, 2000 Respectfully submitted,



JAMES PASTO
Attorney for Petitioner

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APPENDIX A

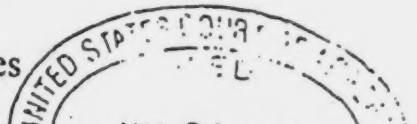
JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 24th day of August, one thousand nine hundred and ninety-nine.

Before: Hon. Guido Calabresi
Hon. Jose A. Cabranes
Hon. Sonia Sotomayor

Circuit Judges



Docket No. 98-1642

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES HENRY KLISSER,

Defendant-Appellant.

APPEAL FROM the United States District Court for the Eastern District of New York.

THIS CAUSE came on to be heard on the Transcript of the Record from the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ORDERED, ADJUDGED, AND DECREED that the judgment of said district court be and it hereby is affirmed in accordance with the opinion of this court.

FOR THE COURT
Karen Greve Milton, Acting Clerk

By:

/s/_____

Beth J. Meader
Administrative Attorney

Issued as Mandate: 10/22/99

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1998

(Argued: August 13, 1999 Decided: August 14, 1999)

Docket No. 98-1642

UNITED STATES OF AMERICA,

Appellee,

v.

CHARLES HENRY KLISSER

Defendant-Appellant.

Before: Calabresi, Cabranes, and Sotomayor, Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Reena, Raggi, Judge) convicting appellant of wire fraud and sentencing him principally 6 to 24 months of imprisonment, three years of supervised release, and a $7,500 fine. Appellant argue, inter alia, that in calculating his offense level under United States Sentencing

Guidelines § 2F1.1, the District Court erred by using an intended loss figure even though no actual loss was possible because he was caught in an undercover sting operation.

Judgment affirmed.

JAMES H. PASTO, San Diego, A,
For Defendant-Appellant

BRIDGET ROHDE, Assistant United States Attorney for the Eastern District of New York (Zachary W. Carter, United States Attorney, and David C. James and David Hennessy, Assistant United States Attorneys, of counsel), for Appellee.

PER CURIAM:

This appeal presents the question of whether the offense-level calculation under United States Sentencing Guidelines § 2F1.1[1] may be based on intended loss even if

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[1]The defendant-appellant in this case was sentenced on October 30, 1998. Certain amendments to § 2F1.1 went into effect on November 1, 1998. See United States Sentencing Commission Guidelines Manual App. C., amends. 577, 587 (Supp. Nov. 1, 1998). We note that these amendments do not bear upon the question presented by this appeal.

no actual loss was possible because the defendant was caught in an undercover sting operation. Appellant Charles Henry Klisser urges us to adopt the interpretation of the United States Court of Appeals for the Tenth Circuit, which held in United States v. Galbraith, 20 F.3d 1054 (10th Cir. 1994), that a zero loss figure must be used in such circumstances. Id. At 1059. We join the several other courts of appeals that have rejected Galbraith and hold that impossibility of actual loss does not require use of a zero loss figure. Accordingly, we affirm the sentence imposed by the United States District Court for the Eastern District of New York (Reena Raggi, Judge).

I.

Klisser was convicted of wire fraud, in violation of 18 U.S.C. § 1343 (1994). The evidence at trial showed that Klisser offered an investment opportunity to an acquaintance who, unbeknownst to Klisser, was cooperating with the government. The acquaintance then introduced an undercover agent to Klisser , who was told that the agent was a pension fund accountant. Klisser was led to believe that the "accountant" planned to misappropriate ten million dollars from the pension fund, make a short-term investment, and then return the ten million dollars to the fund while retaining the profits from the investment. Under the government's theory of the case, the investment opportunity proposed by Klisser was a sham, through which he intended to defraud the fictitious pension fund accountant (and, ultimately, the fictitious pension fund) of the entire ten-million-dollar "investment."

At sentencing, the Guidelines offense level was calculated pursuant to U.S.S.G. § 2F1.1, which applies to offenses involving fraud or deceit, and which prescribes offense level enhancements based on, inter alia, the amount of "the loss." Id., § 2F1.1(b)(1). Klisser urged the District Court to use a zero loss figure on the ground that, because this had been a sting operation with a fictitious victim, no loss had ever been possible. The court determined that neither a zero loss figure nor a ten-million-dollar figure loss would accurately reflect Klisser's degree of culpability. In reaching this conclusion, the court stated that Klisser "was certainly prepared to take the money as quickly as anyone could put it into his hands," but the court also "recognize[d] that in these undercover dealings the Government does have some control over what it offers." Ultimately, the court applied a 12-level enhancement, which corresponded to a loss of more than $1,500,000. See Id., § 2F1.1(b)(1)(M). The court explained that, from the evidence of Klisser's conversations with the cooperating witness and undercover agents, "it was apparent...that Mr. Klisser was attempting to deal in several million dollars.":

Based on this offense level increase and other Guidelines calculations, the District Court determined that the applicable sentencing range was 33 to 41 months of imprisonment. After concluding that a downward departure based on family circumstances was warranted, the court sentenced Klisser principally to 24 months of imprisonment, three years of supervised release, and a $7,500 fine. Judgment was entered accordingly, and this appeal followed.

II.

On appeal, Klisser does not challenge the specific amount of loss which the District Court found that he intended fraudulently to cause. Instead, Klisser challenges his sentence only on the ground that the court erred in refusing to use a zero figure based on the impossibility of actual loss.[2] Klisser relies primarily on Galbraith, in which the Tenth Circuit concluded:

> Because this was an undercover sting operation which was structured to sell stock to a pension fund that did not exist, defendant could not have occasioned any loss even if the scheme had been completed. We conclude the intended or probable loss was zero.

20 F.3d at 1059 (internal footnote omitted); see also United States v. Watkins, 994 F.2d 1192, 1196 (6th Cir. 1993) ("[I]ntended loss must have been possible to be deemed relevant.").

We have distinguished Galbraith, but neither accepted nor rejected its holding. See United States v.

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[2]Klisser raises other arguments that implicate the validity of his conviction but not his sentence. We reject those arguments in a separate summary order filed today.

Falcioni, 45 F.3d 24, 27 (2d Cir. 1995) (distinguishing Galbraith where the defendant's plan could have resulted in loss if the target of the bribe had accepted the payment instead of notifying law enforcement authorities). Several other courts of appeals, however, have explicitly rejected Galbraith and held that impossibility of actual loss–such as where the defendant is caught in a sting operation–does not require use of a zero loss figure. See United States v. Schei, 122 F.3d 944, 996 (11th Cir. 1997); United States v. Studevent, 116 F.3d 1559, 1561-64 (D.C. Cir. 1997); United States v. Robinson, 94 F.3d 1325, 1327-29 (9th Cir. 1996); United States v. Coffman, 94 F.3d 330, 336-37 (7th Cir. 1996); cf. Un ited States v. Ismoila, 100 F.3d 380, 396 (5th Cir. 1996) (following the holding in Robinson and concluding that the risk of loss to victims is not dispositive in calculating loss under § 2F1.1). We agree with the reasoning of these courts, especially the reasoning stated by the District of Columbia Circuit in Studevent.[3] Accordingly, we decline to adopt the Galbraith interpretation, and we hold that the District Court properly based Klisser's offense-level calculation on intended loss, as opposed to zero loss figure.

The judgment of the District Court is affirmed.

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[3]Klisser argues that cases such as Studevent are distinguishable in that, while the defendant was caught in a sting operation, the victim was not a fictional entity. Nevertheless, the holding and reasoning of Studevent clearly apply to sting operations with non-existent victims. See Studevent, 116 F.3d at 1563, n.3.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

As a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the twenty-fourth day of August one thousand nine hundred and ninety-nine.

Present:

Guido Calabresi,
Jose A. Cabranes
Sonia Sotomayor

Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. No. 98-1642

CHARLES HENRY KLISSER,

Defendant-Appellant.

APPEARING FOR APPELLANT
James H. Pasto, San Diego, CA

APPEARING FOR APPELLEES
Bridget Rohde, Assistant United States Attorney for the Eastern District of New York (Zachary W. Carter, United States Attorney, and David C. James and David Hennessy, Assistant United States Attorney, of counsel).

Appeal from the United States District Court for the Eastern District of New York (Reena Raggi, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of said District Court be and hereby is AFFIRMED.

Charles Henry Klisser appeals from a judgment of the District Court convicting him of and sentencing him for

wire fraud, in violation of 18 U.S.C. § 1343 (1994). On appeal, Klisser contends (1) that the evidence at trial was insufficient to support the jury's guilty verdict, (2) that the District Court erred in denying his motion for a mistrial based on the prosecutor's statements during opening argument, and (3) that the District Court erred in calculating his offense level under the United States Sentencing Guidelines.

The evidence at trial showed that Klisser offered an investment opportunity to an acquaintance who, unbeknownst to Klisser, was cooperating with the government. The acquaintance then introduced an undercover agent to Klisser, who was told that the agent was a pension fund accountant. Klisser was led to believe that the "accountant" planned to misappropriate ten million dollars from the pension fund, make as short-term investment, and then return the ten million dollars to the fund while retaining the profits from the investment. Under the government's theory of the case, the investment opportunity proposed by Klisser was a sham, through which he intended to defraud the fictitious pension fund accountant (and, ultimately, the fictitious pension fund) of the entire ten-million-dollar "investment."

A defendant challenging the sufficiency of the evidence "carries a heavy burden." United States v. Morrison, 153 F.3d 34, 49 (2d Cir. 1998). Here, Klisser argues that the evidence was insufficient to demonstrate, beyond a reasonable doubt, that he was not offering a legitimate investment opportunity. Specifically, Klisser maintains that there was no evidence of falsity apart from

the apparent absurdity of the investment terms offered to the undercover agents. As the Government points out, however, there was also evidence, for example, that (1) Klisser had made false statements about the "Federal Reserve" and its supposed authorization of the transaction, (2) Klisser had offered several inconsistent descriptions of the transaction, and (3) Klisser had asked one of the undercover agents whether he was sure that there was no "set up" or "sting operation." By suggesting ways in which this evidence might be explained away, Klisser seems to ignore the familiar fact that, in addressing a sufficiency challenge, we consider the evidence "in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government." Id. at 49 (internal quotations marks omitted). When so viewed, the evidence at trial was such that a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. (internal quotation marks omitted). Accordingly, we reject Klisser's sufficiency-of-evidence challenge.

Klisser also challenges the District Court's denial of his motion for a mistrial. He maintains that he was unduly prejudiced by the government's opening-statement references to his belief that the undercover agent would be investing money misappropriated from a pension fund. Any prejudice resulting from these statements, however, was minimal. Even without the prosecutor's statements, the jury would have learned of Klisser's willingness to receive misappropriated funds. Although the District Court did attempt to have references to the pension fund misappropriation redacted from tape recordings played to

the jury, the court stated that it was impractical to remove all such references. In any event, after the opening statements, the District Court cautioned the jurors that Klisser had been charged only with "investment opportunity fraud, and not any manipulation of pension monies," and that they should not be biased or prejudiced against him based on any suggestion of uncharged criminal conduct. This instruction was sufficiently curative to eliminate any need for a mistrial.

Finally, Klisser argues that the District Court erred in calculating the applicable offense level under the United States Sentencing Guidelines. We reject this argument in a separate, per curiam opinion filed today, which will be published in the Federal Reporter.

For the foregoing reasons, the judgment of the District Court is affirmed.

For the Court,
Karen Greve Milton, Acting Clerk

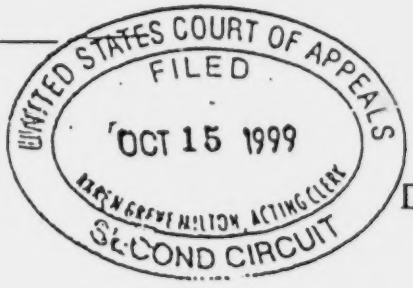
By: /s/ Lucille Cass

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Karen Greve Milton
Acting Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the fifteenth day of October, one thousand nine hundred and ninety-nine.

U.S.A.



v. Dkt No.: 98-1642

Klisser

A petition for a panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Charles Klisser.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

KAREN GREVE MILTON,
Acting Clerk

By: s/s _____
Beth J. Meador,
Administrative Secretary

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